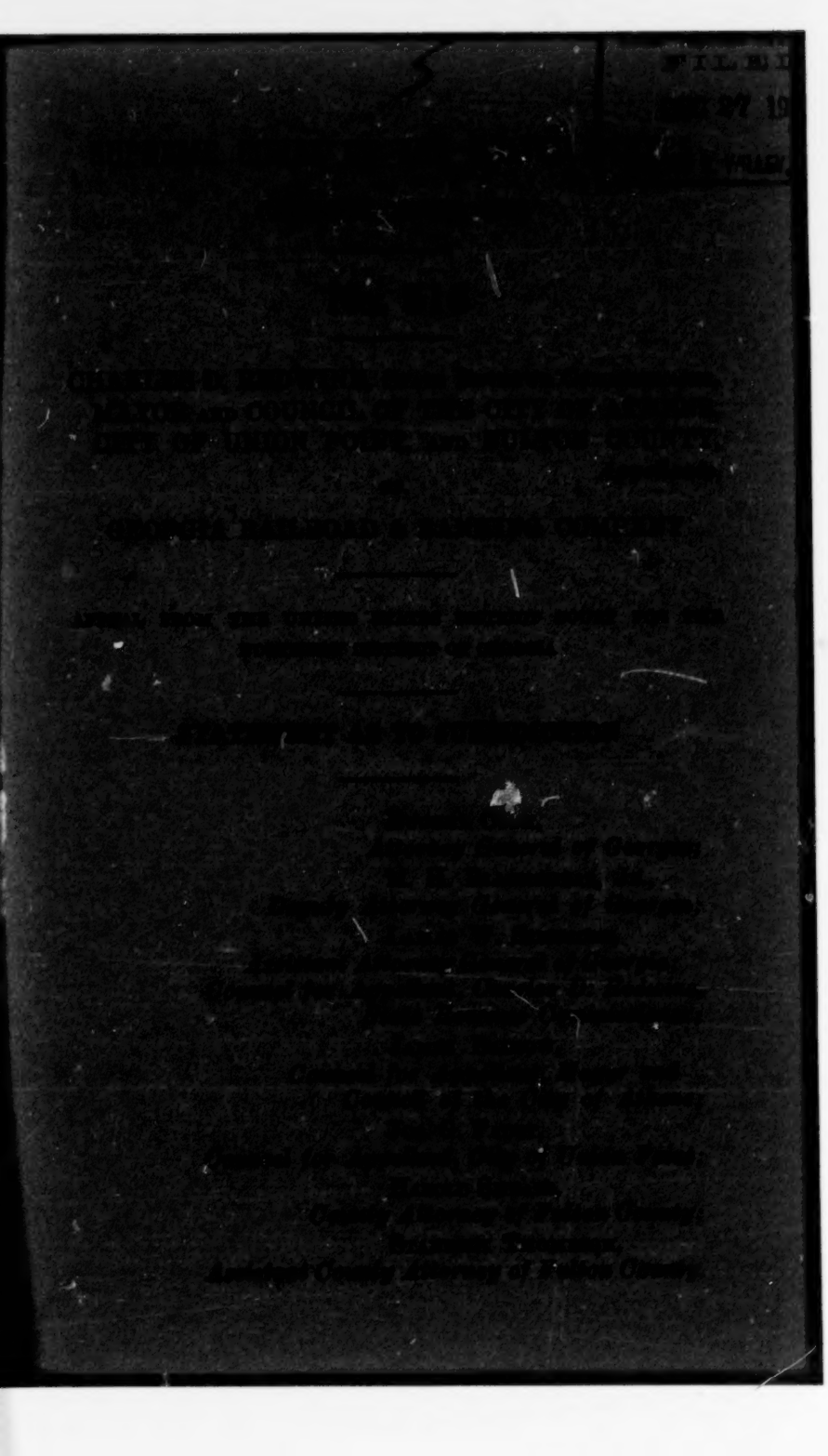

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 516

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER, MAYOR AND COUNCIL OF THE CITY OF ATHENS, CITY OF UNION POINT, AND FULTON COUNTY,
Appellants,

vs.

GEORGIA RAILROAD & BANKING COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT AS TO JURISDICTION

Statement as to the Jurisdiction of the United States Supreme Court

Charles D. Redwine, State Revenue Commissioner, the Mayor and Council of the City of Athens, the City of Union Point, and Fulton County, Appellants, in compliance with

Rule 12 of the Rules of the Supreme Court of the United States, submit herewith their statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

(a) Statutory Provision Believed to Sustain Jurisdiction

The statutory provision believed to sustain jurisdiction is the Act of June 28, 1948, c. 646, 62 Stat. 926, 28 U.S.C. 1253.

The judgment appealed from permanently enjoined the enforcement and operation of the Georgia ad valorem tax statutes against the plaintiff railroad by enjoining the defendant Charles D. Redwine, State Revenue Commissioner, from enforcing and executing such statutes against it on the grounds that said statutes, as applied to the plaintiff, violated Section 10 of Article I of the Constitution of the United States. The action was required by the Act of June 25, 1948, c. 646, 62 Stat. 968, 28 U.S.C. 2281 to be heard and determined by three judges, was in fact so heard and determined, and the Supreme Court of the United States took jurisdiction of the appeal by the plaintiff from the judgment dismissing the action.

(b) The Statutes of Georgia, the Validity of Which Is Involved

(1) Article I, Section III, paragraph III of the 1945 Constitution of Georgia which provides:

> "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

(2) Chapters 92-61, 92-26, 92-27 and 92-28 of the Georgia Code of 1933, and the Act approved January 18, 1938 (Ga.

L. Ex. Sess. 1937-38, pp. 77 *et seq.*) as amended by the Act approved February 17, 1943 (Ga. L. 1943, pp. 204 *et seq.*) Those statutes provide the method and machinery for assessing, levying and collecting State, County, Municipal and school district ad valorem taxes against railroads owning property in the State.

The complaint alleged that the application of the quoted provision of the Georgia Constitution and of the cited statutes to the plaintiff so as to subject its charter lines to ad valorem taxes would violate Section 10 of Article I of the Constitution of the United States and the due process of law provision of the 14th Amendment to that Constitution. The opinion of the Court approved, and the final judgment sustained the former of these Constitutional objections, and granted a permanent injunction against the State Revenue Commissioner.

(c) Date of Judgment and of Application for Appeal

Judgment was entered September 23, 1952, and filed September 27, 1952. The petition for appeal was presented and allowed November 21st, 1952.

(d) Statement Showing Jurisdiction

The plaintiff was chartered by an Act of the General Assembly of Georgia approved December 21, 1833 (Ga. L. 1833, pp. 256 *et seq.*) which provided for the construction of a "Union Railroad" between Augusta, Georgia, and some point in the interior of the State to be agreed upon by the stockholders; and thereafter for the construction of three branches from the terminus of the Union Railroad to the cities of Athens, Eatonton and Madison, Georgia respectively. Section 15 of that Act provided:

> "The stock of said company and its branches shall be exempt from taxation for and during the term of

seven years from and after the completion of said railroads or any one of them; and after that shall be subject to a tax not exceeding one-half per cent per annum on the net proceeds of their investment."

The plaintiff constructed the Union Railroad and two of the branches. It did not construct the branch to Eatonton.

The portion of the plaintiff's road from Madison to Atlanta was authorized by an Act approved December 25, 1837 (Ga. L. 1837, p. 212) which provided that the plaintiff should have all the powers and privileges, rights and immunities in the construction of the branch as were contained in the charter.

By an Act approved October 5, 1868 (Ga. L. 1868, p. 147) the General Assembly authorized the plaintiff to increase its capital in the amount not exceeding two million dollars for the purpose of extending its road from Athens north to Clayton. The plaintiff accepted the provisions of the 1868 Act and issued $44,000.00 worth of additional stock under it, but did not build any part of the Athens-Clayton Road.

In 1874 the General Assembly levied an ad valorem tax on railroads (Ga. L. 1874, p. 107). An effort by the Comptroller General of Georgia to enforce the Act against plaintiff was resisted by it and in *States* v. *Georgia Railroad & Banking Company*, 54 Ga. 423, the Georgia Supreme Court, although expressing disagreement with the rule, held that it was bound by the decision of the United States Supreme Court in the *Dartmouth College* case and in the subsequent cases which followed that decision. It also held that the stock issued under the amendment granted to authorize the Clayton branch was not protected by the charter tax limitation.

By an Act approved December 17, 1902 (Ga. L. 1902, pp.) the General Assembly provided for a tax on franchises and shortly thereafter the Comptroller General

of Georgia threatened to collect the ad valorem and franchise taxes from the plaintiff. It petitioned the Circuit Court of the United States for the Northern District of Georgia for an injunction against the Comptroller General. The injunction was granted except as to the additional stock issued under the Act of 1868 authorizing the Clayton branch, which was not in issue. *Georgia Railroad & Banking Company* v. *Wright*, 132 F. 912. Upon appeal to the United States Supreme Court, the judgment was modified to authorize taxation of the Washington branch railroad but was affirmed as to the remainder of plaintiff's line. *Wright* v. *Georgia Railroad & Banking Company*, 216 U. S. 420. Wilkes and Taliaferro Counties intervened in that action.

At the General Election held August 7, 1945, the people of Georgia ratified the Constitution of 1945 which provided in Article I, Section III, Paragraph III as follows:

> "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

The defendant, State Revenue Commissioner threatened to collect ad valorem taxes from the plaintiff for state, county, municipal and school district purposes at the full rate for each taxing entity for 1939, and all subsequent years.

The plaintiff brought this action in the District Court to enjoin the defendant and to have the threatened acts adjudged a violation of the decree of the court in the earlier case (*Georgia Railroad & Banking Company* v. *Wright*, 132 F. 912) and a contempt of that decree, and alleged that the Georgia statutes providing for ad valorem taxation of railroads, and the quoted provision from the Constitution of 1945, if applied to the plaintiff, would impair the obliga-

tion of its contract with the State, and would deprive it of its property without due process of law, in violation of the Federal Constitution. The action was defended by the State Revenue Commissioner upon the grounds, among others, that the prior cases were not res judicata; that the Constitution of 1798 prohibited the General Assembly from alienating its taxing power by statute; that the violation of its charter obligations by the plaintiff authorized the withdrawal of the charter tax limitation by the State; and that the charter tax limitation did not apply to that branch of the road from Madison to Atlanta.

A three Judge District Court was convened under Sections 2281 and 2284 of the Judicial Code. The Supreme Court of the United States took jurisdiction of the appeal by the plaintiff from the judgment of that court dismissing the complaint and reversed that judgment, remanding the case to the lower court for a decision on the merits. *Georgia Railroad & Banking Company* v. *Redwine,* 342 U. S. 299. Interventions by the Mayor and Council of the City of Athens, The City of Union Point, and Fulton County were allowed. The present appeal is from the lower court's judgment sustaining the plaintiff's amended motion for summary judgment and granting a permanent injunction against defendant.

(e) Authorities Believed to Sustain Jurisdiction

28 U. S. C. 1253
28 U. S. C. 2281
28 U. S. C. 2284
Query v. *U. S.,* 316 U. S. 486
Cleveland v. *U. S.* 323 U. S. 329
Sterling v. *Constanin,* 287 U. S. 378
Stratton v. *St. L. S. W. Railroad Co.* 282 U. S. 10

28 U. S. C. 2281 requires an action to restrain a State officer from assessing and collecting a tax on the ground that the statutes and provisions of the State Constitution are contrary to the United States Constitution to be heard and determined by a three Judge District Court.

28 U. S. C. 2284 requires that an order granting a final judgment in such an action be entered by three Judges.

28 U. S. C. 1253 provides for a direct appeal to the Supreme Court from an Order granting a permanent injunction in such actions.

(f) Authorities Showing That the Questions Are Substantial

The prior decrees relied on by the plaintiff and by the District Court as binding "at least as to all questions put in issue" are not res judicata because separate tax claims for different years constitute distinct causes of action.

Georgia Railroad & Banking Company v. *Wright*, 124 Ga. 596

Wright v. *Georgia Railroad & Banking Company*, 216 U. S. 420

Commissioner v. *Sunnen*, 333 U. S. 591

Tait v. *Western Maryland Railroad Co.* 289 U. S. 620

Even where collateral estoppel is otherwise applicable as to matters actually presented and determined in the earlier litigation, a change in the law removes the estoppel.

Commissioner v. *Sunnen*, 333 U. S. 591

The Georgia law was changed in 1945 by the adoption of a new Constitution which withdrew all charter tax exemptions: (Art. I, Sec. III, Par. III):

> "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

Under no circumstances are the Appellant municipalities and county who have intervened in this action, but who were neither party nor privy to the former litigation, bound by a theory of res judicata or of collateral estoppel.

Bank of Kentucky v. *Kentucky*, 207 U. S. 258
Stone v. *Farmers Bank of Kentucky*, 174 U. S. 409
Livingston County v. *Darlington*, 101 U. S. 409

Neither are the prior state court decisions controlling on the District Court as precedents. Where a question of the violation of the contract clause of the United States Constitution is involved, the Federal Court must decide for itself whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation, even though this involves an appraisal of the statute and decision law of the State.

Coombs v. *Getz*, 285 U. S. 434
Indiana ex rel Anderson v. *Brand*, 303 U. S. 95

The issue that the Georgia Constitution of 1798 prohibited the General Assembly from irrevocably relinquishing the States power of taxation was not made by the pleadings in *State* v. *Georgia Railroad & Banking Company*, 54 Ga. 423. Neither was the authority of the General Assembly in this respect denied by the defendant in *Georgia Railroad & Banking Company* v. *Wright*, 132 F. 912, modified and affirmed, 216 U. S. 420. The records in those cases are a part of the record in this one.

The State Constitution is to be construed in the sense in which it was understood by the makers of it at the time when they made it.

Padelford, Fay & Co. v. *Savannah*, 14 Ga. 438
Houlihan v. *Saussy*, 206 Ga. 1

While the Georgia Constitution of 1789 was in effect the legislature by the Yazoo Act of January 7, 1795, sold for a

mere pittance thirty-five million acres of Georgia's western empire to private land owners. *Watkins Digest* (of Georgia laws) 557. It provided that the proprietors of the western territory could choose when the territory should be divided into counties and that until it was so divided the settlers of that territory should not be represented and the territory was not to be subject to taxation. The aroused people of Georgia, speaking through the General Assembly of 1796, passed the Rescinding Act. *Prince's Digest*, 1820 (of Georgia laws) 515. Section 5(3) of the Rescinding Act declared that the Legislature was not vested "with the power to transfer the sovereignty of the State * * * which it has done by opening the door for sale to foreign powers and a relinquishment of the powers of taxation * * *". Section 6 of the Rescinding Act stated:

> "* * * but the relinquishment of the right of taxation * * * is also repugnant to the whole letter and spirit of the Constitution, it operating as a dereliction of jurisdictional rights, and a virtual dismemberment of the State."

As the Rescinding Act had asserted that the Yazoo Act thus violated Sections 16 and 17 of Article I of the Constitution of 1789, the readoption of these provisions as Sections XXII and XXIII of Article I of the Constitution of 1798 stregthened by additional language from the Rescinding Act which expressly set forth that the territorial and jurisdictional rights held by the free citizens of Georgia in sovereignty were inalienable but by the consent of the free citizens, was an expression by the framers of the Constitution of 1798, and by the people, that the General Assembly could not validly bargain away the taxing power without the consent of the people.

The emphasis given by the District Court to the fact that the question was not raised in the former proceedings "participated in by those close to the event" pales

to insignificance when it is remembered that not until 1874 (Ga. L. 1874, p. 107) seventy-six years after the adoption of the 1798 Constitution, did the General Assembly by a general law, seek to impose an ad valorem tax upon railroads, thus making the issue for *State* v. *Georgia Railroad & Banking Co.*, 54 Ga. 423. Prior thereto taxes had been imposed by special act, such as by the second clause of Section 15 of plaintiff's charter. That was a taxing provision; not an exempting provision.

Even if Section 15 of the plaintiff's charter is held to be a contractual tax limitation within the authority of the General Assembly, that body also had the authority to withdraw it because the plaintiff failed to perform the obligations imposed upon it by the amended charter.

Section I of the charter (Ga. L. 1833, pp. 256 et seq.) requires the plaintiff to construct a Union Railroad and three branch railroads beginning at the point agreed upon by the stock-holders as the terminus of the Union Road and running to Athens, Eatonton and Madison respectively. The title of the charter resolves any ambiguity which might exist in Section I as to whether the construction of the three branches was obligatory or discretionary with the plaintiff. It provided:

> "An Act to incorporate the Georgia Rail Road Company with powers to construct a Rail or Turnpike Road from the City of Augusta, with branches extending to the towns of Eatonton, Madison, in Morgan County, and Athens, *to be carried beyond those places, at the discretion of said company,* * * * "(Emphasis added)

There has been no subsequent Act of the General Assembly expressly repealing the charter obligations of the plaintiff to construct the Eatonton branch. No subsequent Act has been held to repeal that obligation by implication. No repeal by implication could have been effected without an irreconcilable conflict between the two Acts.

Montgomery v. *Board of Education of Richmond County,* 74 Ga. 41

Moore v. *State,* 150 Ga. 679

The statutes cited by the plaintiff for that purpose (Ga. L. 1835, p. 180; Ga. L. 1837, p. 212; Ga. L. 1858, p. 66; Ga. L. 1859 p. 314) are all consistent with a continued obligation on the plaintiff to construct a branch from Union Point, the terminus of the Union Railroad, to Eatonton.

By an Act approved October 5, 1868 (Ga. L. 1868, p. 147) the General Assembly granted the plaintiff power to extend its road from or near the City of Athens to the town of Clayton and to increase its capital in an amount not to exceed two million dollars for that purpose. Plaintiff accepted this amendment to its charter and issued $44,000.00 worth of stock thereunder (transcript of record on former appeal, p. 139) but has admitted in this record that no railroad was ever built by it north from Athens, Georgia.

The plaintiff, upon acceptance of its charter, became solemnly bound to perform the conditions and obligations set out therein.

Southwestern and Central Railroad Co. v. *Collins,* 40 Ga., 583, 624

Trustees of Dartmouth College v. *Woodward,* 4 Wheat, 664, 671, 672

Pennsylvania College cases, 80 U. S. 553

Home of the Friendless v. *Rome,* 75 U. S. 430, 439

Long Island Water Supply v. *City of Brooklyn,* 166 U. S. 685

The right to the tax limitation was forfeited by a breach of the essential conditions upon which it was granted.

Ga. Code of 1933, Sec. 22-1205

Bacon v. *Texas,* 163 U. S. 207

State v. *Morgan,* 28 La. 490

It is only where the forfeiture is for misuses or nonuse of its franchises that a judgment must be obtained in a direct proceeding against the corporation.

Ga. Code of 1933, Sec. 22-1205

Otherwise, the withdrawal of the privilege may be by legislative authority or any other procedure that is not repugnant to established principles of justice.

Public Service Commission v. *Havemeyer*, 296 U. S. 506

The statement from *Thompson* v. *Atlantic Coast Line R. Co.*, 200 Ga. 856, relied on by the District Court, was ex cathedra, being wholly unnecessary to the decision and in flagrant violation of that Court's own practice which makes it the duty of judges to decline deciding on the constitutionality of an Act when it is not necessary to do so.

Armstrong v. *Jones*, 34 Ga. 309
Smith v. *Georgia Granite Corporation*, 186 Ga. 634

It was also indifferently considered by the Georgia Supreme Court in that it assumed a valid contract by the State within the power of the General Assembly to make and which had not been breached by the plaintiff; and it failed to recognize that the people, through Constitutional mandate, can accomplish the same result which the General Assembly also may have had the power to achieve, but can accomplish it more effectively by eliminating the possibility of a conflict with the State Constitution.

Even if the tax limitation had not been withdrawn, the District Court, as a court of equity, should not lend its aid to the plaintiff seeking relief under a contract which it has violated.

Cathcart v. *Robinson*, 5 Pet. 264
Precisions Instrument Mfg. Co. v. *Automotive Maintenance Machinery Company*, 324 U. S. 806

The alleged charter tax limitation did not include that portion of the plaintiff's road from Madison to Atlanta. The construction of that branch was authorized by the Act approved December 25, 1837 (Ga. L. 1837, p. 212) which also provided:

> "• • • and for that purpose the said Georgia Railroad and Banking Company shall have all the powers, privileges, rights and immunities *in the construction* of said branch from Madison as aforesaid, to the said State Rail Road as are contained in the several Acts heretofore passed, and now of force, constituting the charter of the Georgia Railroad and Banking Company, as fully as if the said continuation had been originally a part of the Georgia Rail Road and said acts *shall extend to and regulate the construction of said extended road*, hereby authorized to be constructed, in the same manner, and to the same extent, and for the same purposes and uses, as the same have been used and applied to the Georgia Railroad and its branch from the City of Augusta to the said town of Madison." (Emphasis added).

A Legislature is not to be presumed to have relinquished its power of taxation beyond the narrowest rational reading of an exemption.

Atlantic Coast Line v. *Phillips*, 332 U. S. 168.

The charter contained immunities specifically applicable to the construction of the road, such as the immunity from suspension of the progress of the work by injunction or otherwise, contained in Section 15 of the charter of the Central Railroad & Canal Company (Ga. L. 1835, p. 217) which, by the Act approved 1836 was substituted for Section II of the Georgia Railroad charter.

Prince's Digest, Laws of Georgia to 1837, p. 306.

The words of limitation contained in the Act of 1837 embraced only the privileges, rights and immunities without

which the branch road could not be constructed but did not include immunity from taxation—which had no relation to the construction of the road.

Wilmington & S. R. Co., v. *Alsbrook*, 146 U. S. 279.

The limitations of the 1837 Act were not plead nor adverted to by the Comptroller General or intervenors in *State* v. *Georgia Railroad & Banking Co.*, 54 Ga. 423; *Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420; or *Wright* v. *L. & N. Railroad*, 236 U. S. 687.

Thed octrine that the taxing power of a State, which is as much an attribute of sovereignty as the police power and that of eminent domain, may be made the subject of a contract by one legislature so as to bind all future legislatures, and thus may be bartered away, should be re-examined and repudiated.

State v. *Georgia Railroad & Banking Company*, 54 Ga. 464.

Atlantic & Gulf Railroad Company v. *State*, 55 Ga. 321.

Goldsmith v. *Rome Railroad Company*, 62 Ga. 473.

Fletcher v. *Peck*, 6 Cranch 87.

Green v. *Biddle*, 8 Wheat 1.

State Bank v. *Knoop*, 16 How. 369.

Dissent of Justices Miller, Field and Chief Justice Chase in *Washington University* v. *Rouse*, 8 Wall. 439.

See, also, cases collected at 173 A. L. R. 31, Par. 5.

Here, as in all cases involving construction of the impairment of contracts clause of the Constitution, the Federal question incident to the decision of this case includes determination of whether or not the charter constitutes a contract and, as we insist, the construction and interpretation of such contract as may be found to have been made. It is therefore a Federal question to determine whether the exemption of appellee under its charter extends to ex-

emption from State taxation only, or whether that contract also grants exemption from County, municipality and school taxes. In *Central Railroad and Banking Company* v. *Wright*, 164 U. S. 327, this Court held that the charter exemption was obviously intended only as a limitation on State taxation.

Respectfully submitted,

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Filed November 21, 1952.

APPENDIX

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, NEWNAN DIVISION

No. 185

Civil Action

Georgia Railroad & Banking Co.

v.

Charles D. Redwine, State Revenue Commissioner

Opinion

Before Russell, Circuit Judge, and Hooper and Sloan, District Judges.

By the Court:

The present proceeding is another chapter in the history of the efforts of the Georgia Railroad and Banking Company to maintain its rights to the partial exemption from taxation provided by Section 15 of the Act of 1833 incorporating that railroad. Georgia Laws of 1833, p. 264. The facts of the present proceeding were outlined in a former ruling appearing in 85 F. Supp. 749.

Upon such former hearing of this case, it appeared that the field of dispute had been rather thoroughly explored and tested in past adjudications, which are there referred to, and whereby the validity of the exemption had been established. However, upon consideration of a point not theretofore urged, it was held that the suit was in effect one to compel specific performance of a contract by the State of Georgia and could not be maintained. The ore from what then appeared to be a new vein of legal truth [1]

[1] *Georgia Railroad & Banking Co.* v. *Redwine*, 85 F. Supp. 749.

upon assay in the final and controlling laboratory test, *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U. S. 299, was found to be worthless. The cause was remanded for determination upon the merits. The plaintiff, by amendment, has alleged and, by answers to his request for admission, has established that the expense of counsel fees and court costs of the former litigation [2] were paid from the Georgia State Treasury by warrants drawn by the Governor, and approved by the Comptroller General. The plaintiff therefore contends that the prior decrees are res adjudicata as to the State of Georgia, the present defendant State Revenue Commissioner, and the counties and municipalities on behalf of which the defendant is threatening to collect taxes from the plaintiff. Plaintiff has renewed its motion for summary judgment, as amended. Fulton County and the municipalities of Athens and Union Point have moved to be allowed to intervene. A hearing has been had, and the contentions of the plaintiff and defendant fully presented, as well as argument on behalf of parties at interest, not parties to the record. The movers for intervention were also heard, subject to final determination by the Court of their right to intervene.

The points and counter-points of the parties have been fully and ably presented by arguments and briefs which disclose thoughtful consideration of the issues and careful research and presentation of the authorities bearing upon the three principal questions presented. These are: first, whether the judicial pronouncements in earlier litigations, especially that of the Supreme Court of Georgia in *State of Georgia* v. *Georgia R. & B. Co.*, 54 Ga. 423 (1875), and by the Supreme Court of the United States in *Wright* v. *Georgia R. & B. Co.*, 216 U. S. 420, are res adjudi-

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[2] *Georgia Railroad & Banking Co.* v. *Wright*, 132 Fed. 912; *Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420.

cata in the present proceeding; second, whether, if such decrees be not res adjudicata, they are nevertheless binding as authority; and, third, whether in any event the provision of the charter of the plaintiff granting a partial exemption from taxation is unconstitutional and void because contrary to the provisions of Articles 22, 23 and 24 of the Constitution of Georgia of 1798, in effect at the time of the passage of the Act of 1833, supra.

In the view which we have of this case, we find it unnecessary to pursue to any determinative conclusion the question of whether the ruling of the Supreme Court of Georgia in 54 Ga. 423, supra, constitutes res adjudicata in the technical sense. Likewise, we do not find material or necessary a precise determination of whether the decision of the Supreme Court of the United States in 216 U. S. 420, supra, should be given the effect of res adjudicata, or of estoppel. For, in either event, our judgment is controllingly influenced by the decision in *Georgia Railroad & Banking Co.* v. *Redwine, supra,* that the proceeding is one which can be maintained as against the State Officer, and thus conclusively affect the State. We must conclude that, at least as to all questions put in issue in the former litigation, the decree there entered is binding upon the present defendant, for it is conceded that he stands as successor in office to William A. Wright, Comptroller General, the defendant in the original suit, the defense of which the State assumed, and the expenses of which it paid. *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273; *Warren* v. *Suttles,* 190 Ga. 311; *Coleman* v. *Fields,* 142 Ga. 205. Even if this conclusion should be unsound, we nevertheless reach the same result when the question is considered as ruled and controlled by the decisions in *State of Georgia* v. *Georgia R. & B. Co., supra,* and *Wright* v. *Georgia R. & B. Co., supra,* along with other decisions, which are per-

suasive authorities. There can be no doubt that the Courts of Georgia and the Supreme Court of the United States have uniformly upheld the validity of the exemption in question as against all attacks, except those presently presented, to which we will hereinafter refer. This question was precisely ruled in the two cases to which we have just referred. In *State of Georgia* v. *Georgia R. & B. Co.*, 54 Ga. 423, *supra*, the headnote is as follows:

> "By the original charter of the Georgia Railroad and Banking Company it was, in terms, provided that 'the stock of said company and its branches, shall be exempt from taxation for seven years from the completion of said railroads, or any one of them, and after that, shall be subject to a tax of not exceeding one-half of one per cent per annum on the net proceeds of their investments:'
>
> "Held, that under the settled rules of construction, it was competent for the legislature to grant this exemption, and forming, as it does, a portion of the contract of incorporation, any repeal of it by the legislature, without the consent of the corporation, is in violation of article 1, section 10, paragraph 1 of the constitution of the United States prohibiting any state from passing any law impairing the obligation of contracts."

In *Wright* v. *Georgia R. & B. Co.*, 216 U. S. 420, *supra*, in dealing with the precise charter provisions now under consideration, the headnote states:

> "An act of a state legislature attempting to tax the whole or any part of the capital or franchise of a corporation, whose charter contains an express limitation and method of taxation such as in this case, by any method other than that specified therein, impairs the obligation of the charter and is unconstitutional under the contract clause of the Federal Constitution."

The Supreme Court of Georgia, in *Thompson* v. *Atlantic Coast Line R. Co.*, 200 Ga. 856, held that any attempt to re-

voke such an exemption by a constitutional provision (Article 1, Section 3, paragraph 3, Constitution of Georgia of 1945) was likewise "void and of no effect." Other decisions ruling to the same effect are set forth below,[3] and this recitation attempts no complete citation of all cases considering, or assuming, the validity of such exemption. We must, therefore, consider the question as definitely settled and controlled by prior authority. Of course, if the former decision in this proceeding (216 U. S. 420) does not preclude re-litigation of the issue we should consider and pass upon the attacks upon the validity of the exemption now asserted as defense to the plaintiff's complaint to determine if they require a different result and an overturning of all the former decisions. We have so considered them and find them without merit. We find in the provisions of Articles 22, 23 and 24 of the Constitution of Georgia of 1798, no prohibition against the granting of exemption from taxation which was provided by the charter of the plaintiff. Our conclusion is fortified by the fact that in none of the former proceedings participated in by those close to the event, familiar with, and, indeed, living under, the Georgia Constitution of 1798, did any of the learned and able lawyers who so vigorously resisted the validity of the perpetual exemption set forth in the charter of the plaintiff, nor the Courts in deciding such cases, consider these paragraphs of the Constitution to relate to, or forbid, the grant of exemption from taxation. Indeed, it is conceded by all parties that similar exemptions were provided in the charters of some thirty railroads in the early period of

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[3] *Goldsmith* v. *Georgia R. R. Co.*, 62 Ga. 485; *Wright* v. *Central of Ga. Rwy. Co.*, 236 U. S. 674; *Wright* v. *L. & N. R. R. Co.*, 236 U. S. 687; *Western & Atlantic R. R. Co.* v. *State of Georgia*, 54 Ga. 428; *Central R. R. & B. Co.*, v. *Georgia*, 54 Ga. 401; *Central R. R. & B. Co.* v. *Ga.*, 92 U. S. 665; *Rome R. R. Co.* v. *Mayor & Council*, 14 Ga. 275; *City Council of Augusta* v. *Ga. R. R. & B. Co.*, 26 Ga. 651; *Ordinary of Bibb Co.* v. *Central R. R. & B. Co.*, 40 Ga. 647.

railroad construction. Upon our consideration of the language of these paragraphs of the Constitution of 1798 in the light of contemporary history and especially the then recent infamous experience of the Yazoo fraud, it is clear why no reliance was placed upon this ground of attack. It would have been then, as it is now, without merit.

We have also considered the remaining objections of the defendant which are contended to nullify the exemption claimed by the plaintiff, but do not find them to have such effect. It is well established that the adoption of the 14th Amendment to the Constitution of the United States did not destroy the validity of the exemption. See cases collected in 173 A. L. R. 15, 25. Neither did the failure of the plaintiff to build branches additionally authorized by its charter, one north of Athens towards the Tennessee line, and the other from Madison to Eatonton, render the exemption unavailable to it as to the other lines actually built. We think the question of whether that portion of the railroad from Madison to Atlanta is covered by the exemption is controlled, adversely to the contentions of the defendant, by the language of the Act authorizing such construction (Georgia Laws of 1937, p. 212, section 1), and the decisions in *State of Georgia* v. *Georgia R. & B. Co., supra; Wright* v. *Georgia R. & B. Co., supra,* and is also indicated by the decision in *Wright* v. *L. & N. R. Co.*, 236 U. S. 687.

While, under the statutory scheme with reference to the assessment and collection of ad valorem taxes upon railroads, an injunction restraining the State Revenue Commissioner from assessing and attempting to collect such taxes will effectively bar the rights of the counties and municipalities involved to receive such taxes, since such an injunction would prevent action at its beginning, we, nevertheless, see no objection to permitting the County of

Fulton and the municipalities of Athens and Union Point to intervene and assert their claims in this proceeding. That portion of the intervention of the City of Union Point which seeks affirmative relief presents a matter beyond the scope of this litigation, and is hereby stricken and dismissed, without prejudice. For reasons already indicated, the grounds of attack upon the exemption from taxation asserted are not successfully maintained by these intervenors. However, as we did above in dealing with the defendant's contentions, we may state that even if our conclusion that the counties and municipalities affected are bound by the former adjudications should be erroneous the same result is required by our finding that the grounds of attack urged as new matter, and therefore not concluded by the former litigations, do not authorize a different ruling.

We conclude that the reasoning and binding effect of former adjudications substantially control our ruling in the present proceeding and that no cause is here shown which authorizes the Court to overrule and upset them. It follows, therefore, that the plaintiff is entitled to the relief sought to secure the rights established by the former decree of this Court as modified and affirmed by the decision of the Supreme Court of the United States. A proper decree so providing may be presented after notice.

This August 11th, 1952.

(S.) Robert L. Russell,
United States Circuit Judge.
(S.) Frank A. Hooper,
United States District Judge.
(S.) Boyd Sloan,
United States District Judge.

Filed in Clerk's Office, Aug. 11, 1952.

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DEC 27 19
HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 516

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER, MAYOR AND COUNCIL OF THE CITY OF ATHENS, CITY OF UNION POINT, AND FULTON COUNTY,
Appellants,

vs.

GEORGIA RAILROAD & BANKING COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

ROBERT B. TROUTMAN,
FURMAN SMITH,
Counsel for Appellee.

SPALDING, SIBLEY, TROUTMAN & KELLEY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 516

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER,
Appellant,

vs.

GEORGIA RAILROAD & BANKING COMPANY,
Appellee

MOTION TO AFFIRM PURSUANT TO RULE 12

Pursuant to Rule 12, appellee, Georgia Railroad & Banking Company, moves the Court to affirm the judgment of the District Court on the grounds that questions raised by appellants are so unsubstantial as not to need further argument.

The exact issue in this case—that is, the validity and effect of the contract of exemption—has already been decided by this Court in an action between appellee and the predecessor in office of appellant Redwine, the defendant below. *Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420.

The same issue has also been decided by this Court in an action between the lessees of appellee and the predecessor in office of said defendant. *Wright* v. *Louisville & Nashville Railroad*, 236 U. S. 687.

The same issue has also been decided by the Supreme Court of Georgia in an action between appellee and the State of Georgia. *State of Georgia* v. *Georgia Railroad & Banking Co.*, 54 Ga. 423.

Said defendant is bound by those decisions as *res judicata*. In such case, the cause of action—the thing at issue—is the validity and effect of the contract of exemption and not the various reasons urged against the contract. Therefore, a judgment enjoining a tax on the grounds of a contract of exemption is *res judicata* not only as against the taxes then assessed but against all future taxes, and not only as against the arguments made against the contract of exemption but as against all arguments that could have been made against the contract of exemption. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273; *Deposit Bank* v. *Frankfort*, 191 U. S. 499; *New Orleans* v. *Citizens Bank*, 167 U. S. 371.

Said defendant is bound by the prior judgment of this Court because he is the successor in office of the official there enjoined. (Judgment below, par. 4.) *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273; *New Orleans* v. *Citizens Bank*, 167 U. S. 371; *Maddox* v. *Lithonia Banking Co.*, 166 Ga. 616; *Warren* v. *Suttles*, 190 Ga. 311, 315.

Moreover, the State of Georgia and all subordinate officials of the State are bound by the prior judgment because the State, through its duly authorized officers, to protect its interest therein, openly assumed the defense of the prior action. (Judgment below, par. 3.) The State thereby became bound by the judgment as fully as if it had intervened and become a party. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273; *Souffront* v. *Campagnie des Sucreries*, 217 U. S. 475, 487.

Said defendant is also bound by the prior judgment of the Supreme Court of Georgia. *State of Georgia* v. *Georgia*

Railroad & Banking Co., 54 Ga. 423. In that case the State of Georgia was the party plaintiff. The Courts of Georgia have held that a judgment in an action to enjoin a tax is binding on all other and subsequent officials of the State and in regard to future years where there has been no change in the facts. *Coleman* v. *Fields*, 142 Ga. 205; *Warren* v. *Suttles*, 190 Ga. 311, 315. The statement to the contrary in *Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420, was made before the controlling Georgia decisions, cited above, were decided.

Even if the prior judgments were not *res judicata*, no reason appears why the former decisions of this Court involving the charter of appellee should be reviewed and overruled. The mere fact that appellants now bring forward arguments which able counsel for the State in prior litigation did not consider worth urging, is no reason to review the prior decisions of this Court. All of such arguments were apparent on the face of the record in the earlier litigation.

This and similar charter provisions granted by the Legislature of Georgia have been upheld by at least twenty decisions of this Court and of the Supreme Court of Georgia.[1]

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[1] *Rome Railroad Co.* v. *City of Rome*, 14 Ga. 275; *City Council of Augusta* v. *Georgia Railroad & Banking Co.*, 26 Ga. 651; *Ordinary of Bibb County* v. *Central Railroad & Banking Co.*, 40 Ga. 646; *State of Georgia* v. *Georgia Railroad & Banking Co.*, 54 Ga. 423; *Western & Atlantic Railroad* v. *State*, 54 Ga. 428; *Central Railroad & Banking Co.* v. *State*, 54 Ga. 401; *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665; *Goldsmith* v. *Rome Railroad Co.*, 62 Ga. 473; *Goldsmith* v. *Georgia Railroad Co.*, 62 Ga. 485; *Goldsmith* v. *Augusta & Savannah Railroad Co.*, 62 Ga. 468; *Goldsmith* v. *Central Railroad Co.*, 62 Ga. 509; *Wright* v. *Southwestern Railroad*, 64 Ga. 783; *Southwestern Railroad* v. *Wright*, 68 Ga. 311; *Southwestern Railroad* v. *Wright*, 116 U. S. 231; *State of Georgia* v. *Southwestern Railroad*, 70 Ga. 11; *Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420; *Wright* v. *Louisville & Nashville Railroad*, 236 U. S. 687; *Wright* v. *Central of Georgia Railway*, 236 U. S. 674; *Central of Georgia Railway* v. *Wright*, 248 U. S. 525, on rehearing 250 U. S. 519; *Gardner* v. *Georgia Railroad Co.*, 117 Ga. 222; *City Council of Augusta* v. *Augusta-Aiken Ry. & Elec. Corp.*, 150 Ga. 529.

Appellants ask that those decisions and the hundreds of other decisions upholding charter contracts, including the *Dartmouth College* case, be reviewed and overruled (Assignment of Error No. 2). Appellee respectfully suggests that a case dependent upon overruling the *Dartmouth College* case and the hundreds of cases following is so insubstantial as not to need further argument. This is especially true since the *Dartmouth College* case has become deeply imbedded in the law of the land and property rights have been acquired in reliance thereon. Indeed, this very Railroad has been leased for a long term of years and the present stockholders of this Railroad acquired their stock in reliance on the repeated decisions of this Court and of the Supreme Court of Georgia upholding and enforcing this very charter provision.

WHEREFORE, appellee shows that the questions presented by the appeal have been settled and questions raised by this appeal are too insubstantial to need further argument and the judgment should be affirmed without further argument.

Respectfully submitted,

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